

Appeal from a decision of the Dickinson (North Dakota) District Manager, Bureau of Land Management, denying an application to adopt wild horses. 4700 LGC.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

An application to adopt wild free-roaming horses is properly rejected if, after receiving title to horses from BLM under a prior application filed pursuant to the wild horse adoption program, the applicant sold some of the horses to a slaughter buyer.

APPEARANCES: LeRoy Kalenze, pro se, Berthold, North Dakota; Richard K. Aldrich, Esq., Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

LeRoy Kalenze has appealed from a June 16, 1988, decision of the Dickinson (North Dakota) District Manager, Bureau of Land Management (BLM), denying an application for adoption of 376 wild horses. Appellant's application was filed pursuant to section 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. | 1333(b)(2) (1982), authorizing the adoption of wild free-roaming horses by qualified individuals. Kalenze's application was denied because BLM found that his past sales of wild horses demonstrated his intent to commercially exploit adopted horses and that he would be unable to adequately care for additional horses.

By letter of July 28, 1987, Kalenze applied for 400 wild free-roaming horses, enclosing with his application a list of other adopters for whom he was acting. This letter stated that appellant was presently caring for wild horses and that he had worked with horses and cattle all his life. Kalenze stated that the 400 horses he sought would have ample feed as he planned to "feed big round bales and screenings throughout the winter." He stated that the horses would be wintered at his home ranch and summered at his home pasture. Appellant also noted that he had a reservation lease available, if needed.

The Montana State Office approved the application as to 376 head of unadoptable horses and transmitted Kalenze's application on to the Director, BLM. ^{1/} The State Office noted in its cover memorandum to the Director that a "[f]acilities inspection of [Kalenze's] ranch indicates there should be no problem in caring for this number of animals." It was also noted that all potential adopters had been contacted and their qualifications approved. The State Office requested a total waiver of fees, stating its opinion that a waiver would be in the public interest because adoption would reduce the number of animals held in Governmental facilities at public expense.

The Director, BLM, approved a waiver of adoption fees for 376 horses by memorandum dated December 29, 1987. Approval was based upon State Office findings that (1) these horses were unadoptable at the standard fee of \$125; (2) the horses were to be adopted by 94 qualified individuals represented by Kalenze through a power of attorney agreement; (3) the animals would be maintained in pastures owned by Kalenze near Berthold, North Dakota; (4) all documents and procedural requirements had been completed; (5) the horses would be freeze marked; (6) the adopters had not expressed an intent to commercially exploit the animals, as outlined in Animal Protection Institute of America (API) v. Hodel, 671 F. Supp. 695 (D. Nev. 1987), aff'd, ___ F.2d ___ (9th Cir. 1988); (7) the adoption was in the public interest; (8) the facilities where the animals would be located and maintained had been inspected and found to be adequate for that purpose; (9) screening of the applicants indicated there was every reason to believe that the animals would be cared for in a humane manner; and (10) adoption would reduce the Government's cost of maintaining these excess horses, many of which had been maintained in BLM or contract centers for an extended period of time.

After notifying appellant of the Director's approval, but prior to delivery of the 376 horses, the District Manager rescinded the approval by decision dated June 16, 1988. This action was prompted by a report that appellant had sold other horses to which he had recently obtained title from BLM under a prior application. In his revocation decision, the District Manager stated in relevant part:

I have reevaluated your request in light of recent BLM policy changes and your actions relating to the first group of wild horses for which you had power of attorney. I am denying your request for obtaining additional horses as requested in your July 28, 1987 letter because: (1) On May 26, 1988 you sold 53 head of freeze branded horses from the group which we recently issued title. These horses were sold to Howard Hiatt, a slaughter buyer. This action demonstrates that you intended to commercially exploit wild horses as defined in the U.S. District Court ruling

^{1/} The transmittal memorandum to the Director, BLM, is undated. A file chronology prepared by BLM states that this memorandum was sent on or about Dec. 2, 1987. No explanation appears why the State Office approved adoption of 376 horses rather than the 400 sought.

in API, et al. v. Hodel. (2) On May 21 you sold 6 head of horses and June 11 you sold 65 head of horses and 20 colts through the livestock auction yards in Minot. I understand this was done to reduce your herd numbers to better manage your hay and pasture situation due to abnormally dry weather conditions. Your liquidation of nearly half the broadmares [sic] demonstrates that you would also be unable to adequately care for an additional 376 horses.

On appeal, Kalenze acknowledges that he had sold the horses described in BLM's June 16 decision. He explained that he was under the impression that after receiving title to these horses on May 16, 1988, the horses were his. His intent, appellant stated, was not to sell for slaughter but to manage and maintain a horse ranch. Kalenze reasons that such an operation involves culling, range management, and upgrading the wild mustangs. Regarding the sales cited by BLM, appellant states that he sold horses through Minot Livestock, Northern, and through Howard Hiatt. "The horses went through the sales ring and were sold to the highest bidder," Kalenze notes. "The colts went to various homes. Howard Hiatt, among being a horse buyer, operates a pregnant mare urine line. These were all mares sold to him" (Statement of Reasons, Aug. 10, 1988, at 1).

In appellant's view, the API litigation should not affect his first group of horses, because the API decision was issued in July 1987, which was after he had gained possession of these horses. Responding to BLM's statement that he would be unable to care for an additional 376 horses, appellant states that feed is not a problem because he is managing to put together an abundance of feed, despite being in a drought-affected area, and has contracted with various feed suppliers for additional feed.

The API decision the parties refer to enjoined BLM from "transferring the titles of wild free-roaming horses and burros to individuals who have, prior to the expiration of the one year 'probationary period' prescribed by 16 U.S.C. § 1333(c), expressed to the Secretary an intent, upon the granting of title, to use said animals for commercial purposes." 671 F. Supp. at 698 (emphasis supplied). BLM has defined the underscored phrase to "include slaughtering the animals or selling them for slaughter, as well as those uses which commercially exploit the animals, as addressed in the [43 CFR] 4700 regulations and [Instruction Memorandum (IM)] 87-39." IM 87-601, July 20, 1987, at 1. This definition is congruent with that offered by the United States Court of Appeals for the Ninth Circuit, which Court affirmed the injunction imposed by the District Court. Animal Protection Institute of America v. Hodel, ___ F.2d ___ (9th Cir. 1988). 2/

2/ The Court of Appeals defined "commercial exploitation" to encompass the use of animals as bucking horses in rodeos and the slaughter of animals for processing into pet food. Commercial exploitation is also defined at 43 CFR 4700.0-5(c) to mean using a wild horse because of its characteristics of wildness for direct or indirect financial gain. The opinion of the District Court appeared to use the terms "commercial exploitation" and "commercial use" interchangeably.

In addition to the guidance provided by the API litigation, regulation 43 CFR 4750.3-2 sets forth standards applicable to the instant appeal. The standards are couched in terms of private maintenance, which refers to the 1-year period during which the wild horses are in the possession of the adopter and title remains in the United States:

(a) To qualify to receive a wild horse or burro for private maintenance, an individual shall:

(1) Be 18 years of age or older;

(2) Have no prior conviction for inhumane treatment of animals or for violation of the Act or these regulations;

(3) Have adequate feed, water, and facilities to provide humane care to the number of animals requested. Facilities shall be in safe condition and of sufficient strength and design to contain the animals. The following standards apply:

* * * * *

(iv) Feed and water shall be adequate to meet the nutritional requirements of the animals, based on their age, physiological condition and level of activity; and

* * * * *

(b) The authorized officer shall determine an individual's qualifications based upon information provided in the application form required by § 4750.3-1 of this subpart and Bureau of Land Management records of any previous private maintenance by the individual under the Act.

One additional standard is applicable to the present appeal. Where, as here, an applicant seeks a waiver of the customary \$125 adoption fee, regulation 43 CFR 4750.4-2(b) must be satisfied:

(b) The Director may adjust or waive the adoption fee on determining that wild horses or burros in the custody of the Bureau of Land Management are unadoptable when the full adoption fee is required, and that it is in the public interest to adjust or waive the adoption fee stated in paragraph (a) of this section. The adjustment or waiver shall extend only to those persons who are willing to maintain such animals privately, who demonstrate the ability to care for them properly, and who agree to comply with all rules and regulations relating to wild horses and burros. [Emphasis supplied.]

[1] The BLM decision of June 16, 1988, identifies Howard Hiatt as a slaughter buyer. Kalenze does not dispute this characterization, but prefers to refer to Hiatt as a "horse buyer." Kalenze also suggests, but does not allege, that Hiatt purchased the 53 horses for a pregnant mare

urine line that Hiatt operates. In a response filed September 9, 1988, BLM states that it is highly unlikely that the horses appellant sold to Hiatt could have been used in a urine line. ^{3/} By failing to deny BLM's characterization of Hiatt as a slaughter buyer or to offer further evidence, (e.g., a showing that the purchase price paid indicates purchase for purposes other than slaughter, or evidence to substantiate the suggestion that the mares were actually used in a urine line) appellant has failed to overcome BLM's evidence on this issue. See Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). Although Kalenze states that it was not his intent to sell for slaughter, there is ample basis for the BLM conclusion that his actions belied his words. Therefore, we will not disturb this finding.

The API litigation makes clear that title to wild horses shall not be conveyed to an adopter who, during the 1-year maintenance period, has expressed an intent to sell the horses to a slaughter buyer at the conclusion of the maintenance period. If this intent should be expressed when the application is filed or pending, BLM would be similarly required to reject the application. These conclusions follow because the purpose of the Wild Free-Roaming Horses and Burros Act, as revealed by the statute itself, its legislative history, and prior case law, is to avoid instances where, as in the past, wild horses have been captured for slaughter. Kleppe v. New Mexico, 426 U.S. 529, 536 (1976).

In the instant case Kalenze has not directly stated his intentions regarding the 376 horses he seeks. However, his past conduct is a guide to the course of his future actions. Recognizing that this conclusion involves some speculation, we find it was reasonable for BLM to reach this conclusion in light of appellant's acknowledgment in his statement of reasons that his sales were part of an ongoing horse-ranch operation that involves "culling, range management, and upgrading the wild mustangs." (Emphasis added.) Given this statement, appellant's past conduct, and the case law, the decision of the District Manager is properly affirmed.

Our resolution, supra, of Kalenze's appeal makes unnecessary an inquiry into whether his sale of titled horses by auction constitutes use for a commercial purpose or whether such sale establishes that he had insufficient feed for additional horses. Also unnecessary is any reliance upon IM 88-690 (Sept. 15, 1988), which states that the fiscal year 1989 appropriations bill issuing from the conference committee indicates that no funds are provided

^{3/} The District Manager notes that the collection of PMSG or ECG contained in the urine of pregnant mares requires that the horses be confined to a tie stall with a urine-collection bag strapped to the mare for a period of about 45 days. The horses sold to Hiatt had never been confined to a tie stall, were not halter broke, and would not be gentle enough to allow one to strap on a urine bag, the District Manager concluded. Moreover, according to BLM it was unlikely that the mares, having been titled to Kalenze in mid-May, had been exposed to a stallion. For these reasons, the District Manager found that it was highly unlikely that the mares sold by Kalenze had been purchased for collection of PMSG.

for the fee waiver program, directs that it be terminated until further notice, and prohibits further deliveries until BLM notifies the committee.

This bill caused BLM to terminate fee-waiver adoptions immediately, including those approved prior to April 15, 1988, 4/ but not yet completed. Our brief review of H.R. Rep. No. 862, 100th Cong., 2d Sess. 8, reveals that the conference committee agreed that no funds were to be provided for the fee-waiver adoption program for the fiscal year ending September 30, 1989. The actual appropriations act, P.L. 100-446, 102 Stat. 1774 (1988), is, however, silent in this respect.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the District Manager is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

4/ BLM had previously suspended its fee-waiver program, but applications approved before Apr. 15, 1988, were to be honored. IM 88-690 (Sept. 15, 1988); IM 88-385 (Apr. 21, 1988). In H.R. Rep. No. 713, 100th Cong.,

2d Sess. 9, the Committee on Appropriations noted that it was pleased that BLM had suspended its fee-waiver, mass-adoption program. The Committee further noted that it expected the suspension to continue in fiscal year 1989.